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No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PASQUALE FANETTI,

Respondent,

–against–

HELLENIC LINES LTD.,

Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

ON PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether a shipowner choosing to act as its own stevedore is entitled to that insulation from liability, partial or total, which hiring an independent contractor-stevedore might have afforded, within the statutory scheme of the Longshoremen's and Harbor Workers' Compensation Act?

2. What quantum of evidence, relating to the effect of future taxes on earnings, is sufficient so as to permit a jury instruction based upon the after-tax principle established by Norfolk and Western Ry. Co. v. Liepelt?

COMPANIES AFFILIATED WITH PETITIONER

Listing, pursuant to U.S. Sup. Ct. Rule 28.1, 28 U.S.C. 28.1 (1981), of companies affiliated with the Petitioner, Hellenic Lines Ltd.

1. Hellenic American Agencies, Inc.
2. Universal Cargo Carriers
3. Transpacific Carriers Corp.
4. Trade Asia PTE Ltd.
5. Trade Orient Co. Private Ltd.

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OPINIONS BELOW

The opinion of the United States Court of Appeals, Second Circuit, not yet reported, appears in the Appendix. The opinion of Judge Motley, United States District Court, Southern District, not yet reported, also appears in the Appendix.

JURISDICTION

This action originated in the United States District Court, Southern District of New York. Jurisdiction in the District Court was based upon diversity, 28 U.S.C. §1332 (1976). The judgment which is the subject of this review, was entered in the District Court on February 24, 1981. A memorandum opinion was filed by Judge Motley on June 15, 1981.

A Notice of Appeal to the Second Circuit was filed by defendant's attorney on July 14, 1981. An opinion and judgment of the Court of Appeals affirming the District Court were entered on May 6, 1982. Upon defendant's motion, dated May 13, 1982, a stay of the mandate, pending review of this petition for a writ of certiorari was ordered by the Second Circuit on May 24, 1982. A Notice of Appeal to the Supreme Court was filed by

the defendant on May 18, 1982. This petition is being docketed within thirty (30) days from the stay of the mandate in the Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1976).

STATUTES INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905 (1976).

§905 Exclusiveness of liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel

as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

The petitioner, Hellenic Lines Ltd., appeals from the affirmance of a judgment and verdict of $511,190 in favor of Pasquale Fanetti, the plaintiff, after a jury trial, in U.S. District Court, Southern District of New York. Fanetti, a longshoreman, instituted this action for personal injuries pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. (1976).

The plaintiff claims that he was injured on May 6, 1980, while employed as a winch operator, aboard a vessel owned by the petitioner. At the time of the accident, Hellenic Lines Ltd. was also functioning as its own stevedore. The plaintiff and his co-workers had been procured by Hellenic as stevedores from the union hiring hall.

The longshoremen had been working aboard the vessel since approximately 8:00 a.m. The plaintiff testified that at about 2:55 p.m., while walking to his work station, after a rest period, he slipped and fell on lashing gear, which had been greased.

There was testimony that, during the morning, unidentified members of the ship's crew had placed this lashing gear in the area where Fanetti fell. The plaintiff and his co-workers, however, had continued to work. There was no testimony that the condition was called to the attention of a ship's officer.

Fanetti's immediate supervisor, another longshoreman, had been notified, prior to the accident, of the existence of this equipment on deck. This supervisor, however, failed to report this condition to the stevedore foreman.

The District Court Judge declined

Hellenic's request to charge the jury as to the stevedore's duty to correct an unsafe condition aboard ship. The Court held that since the stevedoring operations were performed by "employees of Hellenic Lines", the latter was not entitled to such an instruction.

In its post-verdict motion, Hellenic asserted that the trial court did not properly instruct the jury on the deduction of future income taxes from its determination of the amount of future lost wages. This motion was denied.

The jurisdiction of the District Court having been predicated upon diversity, 28 U.S.C. §1332 (1976), the petitioner respectfully seeks review by this Court under 28 U.S.C. §1254(1) (1976), based upon the error in the aforementioned rulings.

REASONS FOR GRANTING THE WRIT

I

THE DECISIONS OF THE COURTS BELOW ARE IN CONFLICT WITH THIS COURT'S ANALYSIS OF SECTION 905(b) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, IN EDMONDS v. COMPAGNIE GENERALE TRANSATLANTIQUE

Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act (hereafter referred to as "LHWCA") provides, in pertinent part, that a longshoreman may bring an action against a vessel and that if "such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." 33 U.S.C. §905(b) (1976). In Edmonds v.

Compagnie Generale Transatlantique, 443 U.S. 256 (1979), this Court recently had occasion to interpret this provision.

The Edmonds Court concluded that a "longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the stevedore . . . is partly to blame." Id. at 264. The Court expanded upon its analysis of Section 905(b) by adding that:

> The second sentence of the paragraph is expressly addressed to the different and less familiar arrangement where the injured longshoreman loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company -- in short, to the situation where the ship is its own stevedore. In this situation, the second sentence places some limitations on suits against the vessel for injuries during its stevedoring operations.
>
> . . .
>
> It is necessary only to construe the second sen-

tence to permit a third-party suit against the vessel providing its own loading and unloading services when negligence in its nonstevedoring capacity contributes to the injury. The second sentence means no more than that all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself.

This leaves the question of the measure of recovery against a shipowner, whether or not it is doing its own stevedoring, when as shipowner it is only partially responsible for the negligence, but we are quite unable to distill from the face of the obviously awkward wording of the two sentences any indication that Congress intended to modify the pre-existing rule that a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from the ship.

Id. at 264-66.

The Edmonds Court's interpretation of Section 905(b) is the determinative point at issue in this dispute. Petitioner relies upon Section 905(b) and Edmonds as supporting its position that the courts must preserve the distinction between shipowner and stevedore even if a shipowner chooses to act as its own stevedore. Edmonds mandates that Hellenic, as shipowner, be insulated from the consequences of the negligence of those employed in its stevedoring capacity.

Contrastingly the Court of Appeals, in affirming the jury charge of the District Court, held that a shipowner acting as its own stevedore is not entitled to that insulation, which hiring an independent contractor might have afforded. For this reason, the District Court specifically denied Hellenic's request that the applicable provisions of the Safety and

Health Regulations for Longshoring, 29 C.F.R. §§1918.1, 1918.2, 1918.91 (1980) be submitted as part of its instructions to the jury. Fanetti v. Hellenic Lines Ltd., _____ F.Supp. _____ (S.D.N.Y. 1981) (Appendix at A 37) aff'd, _____ F.2d. _____, n. 1, 2 (2d Cir. 1982). These regulations charge the stevedore and its employees, the longshoremen, with the primary responsibility to correct dangerous conditions. See, Scindia Steam Navigation Co. Ltd. v. De Los Santos, 451 U.S. 156, 176-77 (1981); Evans v. Transportacion Maritima Mexicana, 639 F.2d 848, 859 (2d Cir. 1981).

The lower courts arrived at this determination by concluding that Hellenic should not be permitted to rely upon the "independent contractor" status of its stevedoring function, because it operated simultaneously as both a shipowner and a stevedore. Petitioner respectfully sub-

mits that this failure to treat Hellenic Lines Ltd., as an entity, functioning in two separate and distinct capacities was error. Hellenic relies upon the following authorities in support of this position.

First, the Court of Appeals, Second Circuit, misconstrued the legislative history of "LHWCA". The House Report states in pertinent part that:

> The Committee believes that the rights of an injured longshoreman . . . shall not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services . . . The Committee's intent is that the same principles should apply in determining

> liability of the vessel which employs its own longshoremen . . . as apply when an independent contractor employs such persons.

H.R. Rep. No. 92-1441, 92nd Cong., 2nd Sess., 3 U.S. Code Cong. & Admin. News 4705 (1972).

As evidenced by this Report, the Congressional intent was that the distinction between shipowners and stevedore safety responsibilities was to apply, with full force and effect, even though Hellenic acted as its own stevedore. The District Court's charge, however, blurred this crucial distinction. The lower Court failed to specifically instruct the jury that Hellenic could only be liable for its "owner" occasioned negligence and that it should be absolved of any negligence in its "stevedoring" capacity. Accord, Smith v. Eastern Seaboard Pile Driving, Inc., 604 F 2d 789, 795-97 (2nd

Cir. 1979) (where another Second Circuit panel preserved this distinction and rejected a so-called "single mission" theory); See also, Albergo v. Hellenic Lines Ltd., 658 F. 2d 66 (2nd Cir. 1981) (which also recognized the shipowner/stevedore dichotomy, but which the Court of Appeals in the instant action found not to be apposite to the question in Fanetti.)

Further, the courts below erroneously looked to the "corporate" structure of Hellenic and treated it as a single business entity. The Longshoremen's Act, however, focuses on a "functional", not a "corporate" approach, in delineating the relative rights and obligations of stevedores and shipowners. See, Sea-Land Serv., Inc. v. Director, Office of Workers' Compensation Programs, 540 F.2d 629, 632-33 (3rd Cir. 1976) (Wherein the Court compared the definitions of "employer"

and "employee" prior to and after the 1972 amendments, noting that the amendments had adopted a functional approach); cf. P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) (wherein this Court set forth a "situs" and "status" standard, i.e. "functional" test, in extending the scope of worker coverage under the LHWCA). This distinction between the legal responsibilities of Hellenic, as a shipowner and as a stevedore, was more than a mere academic exercise. It went to the very essence of the case. For even assuming arguendo that the ship's crew initially created a hazardous condition, the jury still should have been instructed to carefully scrutinize the subsequent acts and omissions (i.e. the failure to keep walking areas clear as directed by the regulations) of the stevedore (and its employees, the

longshoremen) in order to ascertain if such conduct was the cause of the accident. Hellenic was denied that opportunity of attributing this accident to an "independent" cause.

Finally, it should be noted that the decisions of the lower courts herein are also in conflict with the opinion of the Third Circuit in Griffith v. Wheeling-Pittsburgh Steel Corp., 521 F.2d 31, 41-43 (3rd Cir. 1975), cert. denied, 423 U.S. 1054 (1976). In Griffith, the Court of Appeals held that:

> The vessel, even a vessel which is an employer under the Act, is relieved of liability for negligence of persons engaged in providing stevedoring services, but is not relieved of liability for its own "owner" occasioned negligence.

Id. at 43.

The Fourth and Fifth Circuits have

expressed similar views in Richardson v. Norfolk Shipbuilding & Drydock Corp., 621 F.2d 633, 634-35 (4th Cir. 1980), Smith v. M/V Captain Fred, 546 F.2d 119, 122-23 (5th Cir. 1977) and Cavalier v. T. Smith and Son, Inc., 668 F.2d 861, 862 (5th Cir. 1982); contra, Robertson v. Jeffboat Inc., 651 F.2d 434, 436 (6th Cir. 1981), cert. pending (Docketed Jan. 1982).

To summarize, therefore, the decision of the Second Circuit herein conflicts with this Court's holding in Edmonds and with the decisions rendered in at least three other Circuits. This conflict justifies the granting of this writ.

II

THE DECISIONS OF THE COURTS BELOW CONFLICT WITH THIS COURT'S OPINION IN SCINDIA STEAM NAVIGATION CO. LTD. v. DE LOS SANTOS

During the trial of this action, the District Court did not have the benefit of this Court's recent opinion in Scindia Steam Navigation Co. Ltd. v. De Los Santos, 451 U.S. 156 (1981). The latter decision suggests that the "LHWCA" requires that a shipowner's duties be judged by a standard apart from a strict adherence to land-based principles. Petitioner submits that the District Court's charge (set forth, in part, at ___ F.2d ____ n. 1 (2nd Cir. 1982) erroneously aligned the duties of a shipowner with those responsibilities of a homeowner, or a property owner, in a non-maritime context.

Admittedly, the legislative history

to the "LHWCA" recommends that a shipowner's liability is to be judged by land based standards. 451 U.S. at 165-66 n. 13. The charge of the District Court, however, failed to clearly set forth the unique relationship among shipowner, stevedore and longshoreman. In the analogy employed by the trial judge in her charge, the jury was left with the understanding that liability flowed directly from the property owner (shipowner) to the invitee (longshoreman). This charge implied a continuing non-delegable duty extending from the property owner (shipowner) to the invitee (longshoreman). Under the LHWCA, the shipowner is, of course, required to exercise reasonable care under the circumstances. The shipowner, however, does not adopt the status of a mere property owner with a direct relationship to an invitee (longshoreman). There is a third participant, an

intermediary, in the relationship, namely the stevedore. The presence of the stevedore on the scene creates a justifiable expectation by the vessel that the stevedore will perform its tasks with reasonable competence and see to the safety of the cargo operations. 451 U.S. at 172. The shipowner is not to be burdened with primary responsibility for safety, nor with a continuing duty to inspect the cargo operations once the stevedore begins its work. 451 U.S. at 163-64 n. 10.

This Court has, in fact, noted that maritime negligence actions under "LHWCA" are not necessarily comparable to non-maritime torts. In De Los Santos, Justice White stated:

> [T]he legislative history does not refer to the Restatement and also states that land-based principles of assumption of risk and contributory negligence are not to be applied in §905(b) cases. This strongly suggests,

> as Kermarec v. Campagnie Generale Transatlantique, 358 US 625 . . . (1959), indicated, that maritime negligence actions are not necessarily to be governed by principles applicable in non-maritime contexts. Furthermore, since the lower courts are not only in disagreement as to the applicability of §§343 and 343A but also as to their import and meaning when applied in the maritime context, those sections, while not irrelevant, do not furnish sure guidance in cases such as this.

451 U.S. at 168 n. 14.

In summary, therefore, Petitioner submits that the erroneous jury instructions in the District Court did not clearly outline to the trier of fact the unique tripartite maritime relationship in this case. For this reason, the decision of the lower courts merit review.

III

THE TRIAL COURT FAILED TO INSTRUCT THE JURY PROPERLY AS TO THE DEDUCTION OF FUTURE INCOME TAXES FROM THE AMOUNT OF FUTURE LOST WAGES

Relying upon this Court's decision in Norfolk and Western Ry. Co. v. Liepelt, 444 U.S. 490 (1980), Hellenic submitted a proposed jury instruction seeking to invoke the after tax principle set forth in that case. The District Court, however, instructed the jury only in general terms that there would be no liability for taxes on any amount awarded to the plaintiff. In its post trial motion, Hellenic claimed error, attributing it to the absence of the requested charge. Specifically, the District Court failed to employ Hellenic's proposed instruction that the jury must deduct from any amount of lost wages, the amount of income taxes

on those wages.

The Court of Appeals, in affirming the trial court, stated that Hellenic failed to invoke the after tax principle of Liepelt in a timely and proper fashion. Petitioner respectfully submits that, while no specific exception was taken to the District Court's charge on the issue, by virtue of its proposed jury instruction, Hellenic's position on this question was made clear to the Court so as to satisfy FED. R. Civ. P. 51. As one set of commentators has noted:

> The failure to object may be disregarded if the party's position has previously been clearly made to the court and it is plain that a further objection would be unavailing.

C. Wright & A. Miller, 9 Federal Practice and Procedure §2553 at 639-640 (1971); see, Lang v. Texas and Pacific Ry. Co., 624 F.2d 1275, 1279 (5th Cir. 1980).

The Second Circuit also noted that Hellenic offered no evidence to establish plaintiff's future taxes. Petitioner submits, however, that it was entitled to rely upon plaintiff's income tax returns, which were introduced into evidence. From these returns a jury was entitled to project future tax rates.

Standing alone, these tax returns were evidence sufficient to permit Hellenic to invoke the after tax principle of Liepelt. While the latter decision was based upon a trial record where an expert's estimates were called into question, this Court did not explicitly limit the application of the after tax principle to only those situations where an economist has testified. In short, if a jury was allowed to calculate plaintiff's future loss of earnings from Fanetti's tax returns, the trial court should have charged that they could like-

wise estimate Fanetti's future taxes based upon those returns.

For this reason, therefore, Hellenic submits that this petition merits review and the granting of the writ.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 468—August Term, 1981

(Argued January 14, 1982 Decided May 6, 1982)

Docket No. 81-7500

PASQUALE FANETTI,

Plaintiff-Appellee,

—v.—

HELLENIC LINES LTD.,

Defendant-Appellant.

Before:

OAKES and NEWMAN, *Circuit Judges,*
and HAIGHT, *District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York, following a

* Of the Southern District of New York, sitting by designation.

jury trial before Judge Constance Baker Motley, and from the denial of defendant's motion for a new trial, remittitur or judgment notwithstanding the verdict.

Affirmed.

ROBERT ALEXANDER HULTEN, New York, NY (Edwin K. Reid, Zock, Petrie, Reid & Curtin, of counsel), *for Appellant.*

MORRIS CIZNER, New York, NY (Zimmerman & Zimmerman, of counsel), *for Appellee.*

HAIGHT, *District Judge*:

Hellenic Lines Ltd. ("Hellenic") appeals from a plaintiff's verdict following a jury trial in the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, in an action brought under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950 (1976). The significant questions on the appeal concern Hellenic's liability, within the statutory scheme, as both shipowner and stevedore; and whether the calculation of lost future wages should be made on the basis of gross wages, or net wages after deduction for income taxes. We affirm.

I.

On May 6, 1980, plaintiff Pasquale Fanetti was working as a longshoreman on board the M/V HELLENIC

SPLENDOR, then berthed at Brooklyn, N. Y. Fanetti was part of a work gang, supervised by hatch boss Allesandro DeLiso, and engaged in loading containers at the No. 2 hatch. Fanetti operated a winch which swung one of the vessel's booms inshore and offshore.

Hellenic owned the HELLENIC SPLENDOR. It also acted as stevedore, procuring longshoremen labor directly from the union hiring hall in Brooklyn in accordance with the needs of Hellenic's vessels. The longshoremen thus hired were paid by Hellenic Lines Ltd. salary checks. This arrangement contrasts with the retention by a shipowner of an independent stevedoring contractor. Hellenic's commercial practice of assuming the dual roles of shipowner and stevedore has previously come to the attention of this Court. *Napoli v. TransPacific Carriers Corp.*, 536 F.2d 505 (1976).

Fanetti was injured at about 2:55 p.m. on May 6, as he was proceeding toward his place of work at the winch controls. The controls for the boom being used were located on a raised deck extending from the No. 2 hatch forward. Two ladders, one on the inshore side of the vessel and the other on the offshore side, gave access to the raised deck; the winch controls themselves were 10 feet forward of the hatch. Thus to get to the winch controls from a position on the deck aft of the hatch, one had to go up either of the two ladders, and then walk 10 feet to the controls. Fanetti, returning from a "blow" (rest period from work), climbed the offshore ladder and headed across the raised deck toward the winch controls. When he was about four feet away from the ladder, he slipped and fell, suffering the injuries complained of.

Fanetti alleged, and the jury was entitled to find, that the passageway he was required to transverse across the raised deck to get to his work site was obstructed by

lashing gear, including greased and oily turnbuckles, chains and wires, and that the deck itself was oily and greasy. These hazards were generated by the actions of the vessel's crew. After the longshoremen finished loading the containers, the crew was responsible for lashing them securely in place. In preparation for that work crew members brought lashing equipment onto the raised deck and dumped it on the walkways. That equipment consisted of metal turnbuckles 2-1/2-3 feet long, wires the thickness of a finger 20-25 feet long, and chains. These artifacts were greased and oiled to prevent rusting. When laid down upon the deck, they rendered portions of the deck oily and greasy. When the longshoremen commenced work at the No. 2 hatch at 8:00 a.m. there were a few turnbuckles on the deck, but throughout the day the crew brought more lashing equipment and placed it on the raised deck, so that by the time of the accident in mid-afternoon the area from the ladders to the controls was so obstructed that one had to walk over the equipment to get to the controls. While so engaged, Fanetti slipped and fell.

Fanetti and his hatch boss DeLiso both testified that they complained to "seamen" or "crewman" about the obstructions, to no avail. There was no evidence that the condition was called to the attention of a ship's officer.

The jury, after hearing this evidence and medical testimony, returned a verdict in Fanetti's favor for $511,190. Hellenic moved for judgment n.o.v., remittitur or a new trial, all of which the District Judge denied. This appeal followed.

II.

We do not understand Hellenic to dispute on the appeal that the vessel's crew, in the performance of work unrela-

ted to the longshoremen's loading of cargo, created a condition on deck dangerous to the longshoremen who had to work there. Rather, Hellenic taxes the trial court with error in its jury charge by failing to distinguish between shipowner and stevedore safety responsibilities. That distinction, or as alternatively phrased, "[t]he dichotomy between shipowner and stevedoring functions" (Hellenic brief at 3), is said to apply with full force and effect even though Hellenic, opting not to hire an independent contractor, instead acted as its own stevedore. In the light of that distinction, the argument continues, Judge Motley's charge on the subject of Hellenic's duty to plaintiff *qua* shipowner[1] was adequate. Hellenic views itself as entitled to a charge based on the standards promulgated by this Court for the situation in which a

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[1] That portion of the district court's charge relevant to the appeal reads as follows:

> "Now the duty of a shipowner to a longshoreman in these circumstances is closely related to the duty owed by homeowner or property owner to one whom the homeowner or property owner invites into his premises. In inviting others onto his premises, the owner is considered to be offering some assurance to the invitee that the place is prepared for his reception and that reasonable care has been exercised to make it safe for his use. In this case, the property of the defendant is a vessel, a ship. That is not to say that the shipowner must make his vessel absolutely free of all dangers or hazards. The shipowner's duty in this case was to exercise reasonable care under the circumstances to provide a reasonably safe place for the longshoremen to work. This means that the shipowner must take remedial steps to protect longshoremen from concealed or non obvious defects, where the shipowner knows or should have known of the condition and should realize that it is an unreasonable risk of harm.
>
> "Now in this case it is not claimed that the shipowner failed to correct a concealed or non obvious defect. It is claimed that the shipowner knew of the dangerous condition created by the seamen, since it was an open and obvious situation. The shipowner is not liable for injuries resulting from known or obvious dangers, unless the shipowner should anticipate a harm despite the obviousness of danger . . . "

shipowner hires an independent contracting stevedore. *Evans v. Transportation Maritime Mexicana SS. "CAMPECHE"*, 639 F.2d 848 (2d Cir. 1981), is cited as a recent, salutary example. *Evans,* following earlier cases decided by this Court, held that "a vessel is not liable for injuries resulting from known or obvious dangers unless the shipowner should anticipate the harm despite the obviousness of the danger," 639 F.2d at 855; the "*sine qua non* of a ship's liability for an obviously dangerous condition arising during the process of loading or unloading is reasonable anticipation that the longshoreman will not be able to avoid it." *Id.* at 856, quoting *Giglio v. Farrell Lines, Inc.*, 613 F.2d 429, 432-33 (2d Cir. 1980). "If a charge were given to the jury along the guidelines of the *Evans* case," Hellenic argues in its brief, "the verdict may have been for the shipowner rather than the plaintiff."

In particular, Hellenic argues that Judge Motley should have informed the jury that the stevedore bears the primary responsibility to correct dangerous conditions, and that the shipowner will often rely on the stevedore to do so. The charge is criticized for failing to discuss "the unique degree of anticipation to which the shipowner is entitled, based on its functional relationship with its stevedore," brief at 8. In that regard, Hellenic complains that the judge did not inform the jury that the "stevedore" was responsible for insuring compliance with relevant safety and health regulations for longshoring.[2]

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2 The particular instructions requested by Hellenic are as follows:

"8. It was the duty of the stevedore employer to furnish the plaintiff with a safe place to work. *29 C.F.R., Chapter XVII, Sections 1918.1 and 1918.2.*

"9. The safety and Health Regulations for longshoring provides that: 'Weather deck walking and working areas shall be kept

Even if the requested charge had been given, the exoneration of Hellenic on the evidence in this case is unlikely. Crew negligence created the hazard, just as in *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980), where a longshoreman fell on deck as the result "of a general obstruction of the walking area by various types of refuse." *Id.* at 33. The shipowner in *Doca* hired an independent stevedoring contractor. The district court, trying the case without a jury, assessed 90% liability against the shipowner. We affirmed, observing that "[t]he ship's crew had created this hazard, and the ship was primarily responsible for it." *Ibid.*

Nonetheless, the independent stevedoring contractor in *Doca* bore the remaining 10% of liability because a regulation promulgated by the Occupational Safety and Health Administration, 29 C.F.R. § 1918.91(a) (1979), required stevedores to keep their work area free of "tripping or stumbling hazards"; we affirmed the district court's conclusion that the regulation created a non-delegable duty to remove the hazard, adding that "[t]he fact that the hazard was primarily the ship's responsibility does not excuse the stevedore from fulfilling its regula-

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reasonably clear of lines, bridles, dunnage and all other loose tripping or stumbling hazards.' *(29 C.F.R., Chapter XVII, Section 1918.91 (a).*

"The safety and Health Regulations for Longshoring further provides: 'Slipperty conditions shall be eliminated as they occur and loose paper, dunnage and debris shall be collected as the work progresses and be kept clear of the immediate work area.' *(29 C.F.R., Chapter XVII, Section 1918.91 (c) and (d).*

"10. The responsibility for removing such hazards is on the stevedore. *(29 C.F.R., Section 1918.2 (a), .3 (c).*

"11. The shipowner had no duty to supervise the operations of the stevedore. Therefore, any failure of the stevedore to conduct its operations properly would not be the responsibility of the ship."

tory obligation," *ibid.* In the case at bar, we are not prepared to say that no reasonable jury could find that the obstruction was at a place where an independent contractor (if one existed) would have been expected to remove it. We therefore confront the question posed by Hellenic on this appeal: whether a shipowner choosing to act as its own stevedore is entitled to that insulation from liability, partial or total, which hiring an independent contractor might have afforded.

We answer that question in the negative, for the reason stated by Judge Friendly in *Napoli v. TransPacific Carriers Corp., supra,* 536 F.2d at 508, where Hellenic was also the shipowner:

> " . . . a charge which relieves a shipowner of liability for a dangerous condition which was 'known to the stevedore or to any of its employees' is clearly inappropriate where the shipowner, itself, is the stevedore."

See also *Canizzo v. Farrell Lines, Inc.,* 579 F.2d 682, 689-90 (2d Cir. 1978), Friendly, Ct.J., dissenting:

> "Where, as in [*Napoli*], there is no independent contractor, it *is* part of the ship's duty to exercise reasonable care to inspect its own workers' workplace, to remove grease spills, etc. In such a case there is no 'independent contractor' with primary responsibility upon whom the ship may properly rely . . . Things are very different when the longshoreman works for an independent stevedore who has primary responsibility for the workplace." (emphasis in original).

The concept of stevedoring contractor as independent expert upon whom the shipowner may reasonably rely

runs like a *leitmotiv* through the cases, most recently *Evans, supra,* 639 F.2d at 856:

> "In determining whether a shipowner should anticipate injury to longshoremen resulting from a known dangerous condition, courts must take into consideration the independent-contractor status of the stevedore. *See Giglio v. Farrell Lines, Inc., supra,* 613 F.2d at 435; *Canizzo v. Farrell Lines, Inc., supra,* 579 F.2d at 688 (Friendly, J., dissenting). *Lubrano v. Royal Netherlands Steamship Co., supra,* 572 F.2d at 372 (Moore, J., dissenting). *See also* Comment, *supra,* at 749, 751-52; Robertson, *supra,* at 451. The stevedore is specifically hired for its expertise in coping with the dangers inherent in loading and unloading cargo, and in many cases it will be perfectly reasonable for the shipowner to assume that the stevedore will correct the defect. *See Giglio v. Farrell Lines, Inc., supra,* 613 F.2d at 433; *Canizzo v. Farrell Lines, Inc., supra,* 579 F.2d at 689 (Friendly, J., dissenting) ('No decision of this court requires us to ignore the ship's justifiable reliance on the independent contractors to perform their duty.')."

A shipowner is, of course, at liberty to refrain from hiring an independent stevedoring contractor. Presumably it does so to save money. However, that saving is accomplished at the cost of not having an independent expert on board. As myriad cases in this field demonstrate, the presence of the expert independent stevedoring contractor furnishes the shipowner with significant protection, in the form of insulation from liability for its own acts which would otherwise attach. But the ship-

owner cannot save the premium and still claim the protection.

Hellenic argues that the analyses quoted from *Napoli* and *Canizzo* would never have been articulated if the Supreme Court's decision in *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256 (1979), had then been available. We do not agree. In *Edmonds* the injured longshoreman was employed by an independent stevedoring company. The jury determined that he was responsible for 10% of the total negligence resulting in his injury, that the stevedore's fault, through a co-employee's negligence, contributed 70%, and that the shipowner was accountable for 20%. The district court reduced the longshoreman's recovery by 10%, but refused further to reduce the award against the shipowner in proportion to the fault of the employer. The Fourth Circuit reversed and held the shipowner liable only for that share of the total damages equivalent to the ratio of its fault to the total fault, regarding that result as necessary to reconcile two sentences added as part of the 1972 amendments to LHWCA at 33 U.S.C. § 905(b). Those sentences read:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring in action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if

> the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel."

The Supreme Court reversed and reinstated the judgment of the district court. The Court observed that the first sentence of § 905(b) was drafted by Congress to overrule the express or implied warranty of a stevedore's workmanlike service declared in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), which could result in indemnification of the shipowner by the stevedore for the former's liability to the longshoreman. By overruling *Ryan*, the first sentence of § 905(b) "prevents the vessel from recouping from the stevedore any of the damages that the longshoreman may recover from the vessel." 443 U.S. at 264. The Court continued:

> "But the sentence neither expressly nor implicitly purports to overrule or modify the traditional rule that the longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the stevedore, whose limited liability is fixed by statute, is partly to blame." *Ibid.*

Rather than stopping there, the Court in *Edmonds* went on to analyze the second sentence of § 905(b). Although recognizing that application of the second sentence "is not involved in this case," *id.* at 265, the Court engaged in the analysis to deal with inconsistencies between the two sentences perceived by the Fourth Circuit. The Court stated:

> "The second sentence of the paragraph is expressly addressed to the different and less familiar arrange-

ment where the injured longshoreman loading or unloading the ship is employed by the vessel itself, not by a separate stevedoring company—in short, to the situation where the ship is its own stevedore. In this situation, the second sentence places some limitations on suits against the vessel for injuries caused during its stevedoring operations. Whatever these limitations may be, there is no conflict between the two sentences, and one arises only if the second sentence is read, as the Court of Appeals read it, as applying to all injured longshoremen, whether employed by the ship or by an independent stevedore. Nothing in the legislative history advises this construction of the sentence, and we see no reason to depart from the language of the statute in this respect." *Id.* at 264-65 (footnotes omitted).

To avoid any other practical difficulties, the Court continued:

" . . . it is necessary only to construe the second sentence to permit a third-party suit against the vessel providing its own loading and unloading services when negligence in its nonstevedoring capacity contributes to the injury. The second sentence means no more than that *all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself.*

"This leaves the question of the measure of recovery against a shipowner, whether or not it is doing its own stevedoring, when as shipowner it is only partially responsible for the negligence, but we are quite unable to distill from the face of the obviously

awkward wording of the two sentences any indication that Congress intended to modify the pre-existing rule that a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from the ship." *Id.* at 266 (emphasis added).

Hellenic relies upon the italicized language as supporting its contention that a shipowner acting as its own stevedore should be entitled to rely upon itself as expert stevedoring contractor, thereby insulating itself from the consequences of its negligence as shipowner. Additional authority for this proposition is also said to be found in the legislative history of the 1972 amendments.[3] In our view, however, the *Edmonds* Court's attempted clarification of "the obviously awkward wording of the two sentences" of this statute should not be so far removed from the context in which it was given as to require what we continue to consider, with Judge Friendly in *Napoli* and *Canizzo,* an illogical result. The Court's purpose in *Edmonds* was to achieve a statutory construction which would permit an injured longshoreman to recover his full damages from a shipowner only concurrently negligent. That was also the thrust of the legislative history, with its articulated belief "that the rights of an injured longshore-

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3 S.Rep.No. 92-1125 (1972) states at pp. 11-12:

"The Committee believes that the rights of an injured longshoreman . . . shall not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services . . . The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen . . . as apply when an independent contractor employs such persons."

man . . . shall not depend on whether he was employed directly by the vessel or by an independent contractor." That salutary purpose may be preserved without requiring trial judges to give juries instructions about the shipowner's right to rely upon an expert contractor who, in fact, was not there. The concept is schizophrenic and the predictable effect upon the jury one of bafflement. The Supreme Court itself, in the later case of *Scindia Steam & Navigation Co. v. De Los Santos*, 415 U.S. 156 (1981), emphasized that "the legal duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed are relevant in determining whether the shipowner has breached its duty." *Id.* at 176. Implicit in that analysis is the existence of an independent, expert stevedore upon whom the shipowner's "justifiable expectations" may reasonably fall. In those circumstances, and as Judge Friendly said in *Canizzo*, "[t]hings are very different"; and we do not read in *Edmonds* anything which requires us to accede to Hellenic's request that illusion be substituted for reality.

We hold that the requested charge is not appropriate where, as here, the shipowner acted as its own stevedore. In consequence, we find no error with the district court's instructions.[4]

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[4] *Albergo v. Hellenic Lines, Inc.*, 658 F.2d 66 (2d Cir. 1981), also relied on by Hellenic, is not to the contrary. *Albergo* affirmed the district court's grant of judgment n.o.v. to defendant because "as a matter of law there was no factual or legal basis for an anticipation by the ship that the plaintiff would be unable to avoid the claimed hazard despite its obviousness and the way he himself dealt with it." The decision continues:

> "The simple act performed by the plaintiff of moving the skinny rope cuttings aside with his hand from the area where he had to shackle, which was the area of the accident, eloquently strikes down any notion of the existence of a negligent condition for which the

III.

Hellenic complains of the district judge's charge on the subject of income taxes. The court's charge on that subject in its entirety was as follows:

> "If you make an award to the plaintiff, the amount so awarded is not subject to federal or state income taxes and no amount may be added to the award believing that such taxes would be due."

Hellenic made no objection to the charge as given. However, in a post-verdict motion it asserted that a new trial was required because the jury was not also instructed to deduct future income taxes from its determination of the amount of future lost wages. Reliance was placed upon *Norfolk & Western Railway Co. v. Liepelt,* 444 U.S. 490 (1980).

Liepelt, a death action brought under the Federal Employers' Liability Act ("FELA"), held that the trial court erred in excluding the defendant's proffered testimony of an expert witness that the decedent's federal income taxes, during the period of lost future wages, would have amounted to a particular figure, which defendant wished to urge in reduction of damages. The Court held in *Liepelt* that under the FELA, the measure of

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vessel owner could be held in damages. As a matter of law there was no such negligent condition nor any basis for anticipation that the longshoreman could not avoid the rope in this case—certainly not one remaining at any time after plaintiff cleared the untidy condition impeding him." *Id.* at 69.

Hellenic was the defendant in *Albergo,* and again acted as its own stevedore. While language in the opinion could be read as recognizing the shipowner/stevedore dichotomy, the context was entirely different. Unlike the case at bar, *Albergo* did not involve injury to a longshoreman resulting from a hazardous condition created by crew negligence. We do not regard *Albergo* as apposite to the question presented here.

recovery is the damages that flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received. Since it is after-tax income, rather than gross income before taxes, that provides the only realistic measure of a wage earner's ability to support his family, it necessarily follows "that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependends when he dies." 444 U.S. at 493-94. The Court rejected "the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury," *ibid.*, and remanded the case for further proceedings consistent with its opinion.[5]

Although for the reasons stated *infra* Hellenic is not in a position to benefit from it, we take this opportunity to extend the *Liepelt* decision at least to all claims for future wages based solely on federal law. In *McWeeney v. New York, New Haven & Hartford R.R. Co.*, 282 F.2d 34 (2d Cir.) (*en banc*), *cert. denied*, 364 U.S. 870 (1960), an FELA case, we held that the district court had not committed error in refusing defendant's request that the jury be instructed to "calculate any past or future loss of earnings on the basis of [plaintiff's] net income after deduction of income taxes." *Id.* at 35. But Judge Lumbard's dissenting observation—"it seems to me that it is manifestly unfair to a defendant to ignore the substantial item of income tax payments on future income," *id.* at 43—forecast the Supreme Court's identical conclusion in *Liepelt*; and we see no basis for distinguishing in this regard between FELA and LHWCA cases. Focusing

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5 The second point of decision in *Liepelt* was that a defendant is entitled to a jury instruction that the award of damages would not be subject to income taxation. 444 U.S. at 496-98. As noted *supra*, Judge Motley gave that instruction in the case at bar.

upon after-tax earnings is an exercise in economic fairness; by this decision we extend it at least to all federal law claims for future lost wages. Cf. *Gulf Offshore Co. v. Mobil Oil Corp.*, ____ U.S. ____, 101 S.Ct. 2870, 2880 (1981), a personal injury case arising under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.*, ("OCSLA"), in which the Court characterized the *Liepelt* instruction that damage awards are not subject to federal income taxation as an instruction which furthers "strong federal policies of fairness and efficiency in litigation of federal claims."[6]

However, to take advantage of the after-tax principle, a defendant must invoke it in timely and proper fashion. In the case at bar, Hellenic cited *Liepelt* in its original request that the judge charge the jury:

> "If you find that plaintiff's damages from his accident include lost wages, then you must subtract the amount of income taxes plaintiff would have had to pay on those lost wages."

But Hellenic, unlike the defendant in *Liepelt*, offered no evidence to establish what amount of future taxes plaintiff would have incurred.[7] Hellenic did not seek a stipula-

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[6] *Gulf Offshore Co.* did not consider the applicability to OCSLA cases of *Liepelt's* holding that defendant is entitled to introduce evidence showing the effect of income taxes on plaintiff's future earnings. 101 S.Ct. at 2879 n.14.

We leave for another day a defendant's entitlement to a *Liepelt* charge where federal jurisdiction is based solely on diversity of citizenship. Again, *cf. Gulf Offshore Co.*, where the Court, in view of the particular federal/state choice of law provisions in OCSLA, remanded the case for a determination of whether Louisiana law required the instruction and, if it did not, whether *Liepelt* displaced the state rule in an OCSLA case. *Id.* at 2880.

[7] Some of the factors to be considered in the calculation of future taxes are summarized in *Liepelt* at 494:

(footnote continued on next page)

tion from plaintiff on the point before resting its case. While plaintiff's more recent tax returns had been received in evidence to prove his past earnings, Hellenic did not indicate before the evidence closed that it would rely on those returns to quantify future taxes, thereby depriving plaintiff of an opportunity to offer his own evidence, expert or otherwise, of what his future taxes might be. For that reason we reject Hellenic's argument that the trial judge should have instructed the jury on the basis of the past tax returns, or used them to make future tax calculations herself. Finally, Hellenic did not object to the charge ultimately given by the district court on the general subject of taxes. In these circumstances, Hellenic is not entitled to relief on appeal.

For the future guidance of the district courts and trial bar, we hold that a defendant confronted with a claim for future lost wages is entitled to an after-tax charge based on *Liepelt* when there is present in the record a stipulation of future taxes; or evidence of future taxes; or evidence of past taxes, in which event the jury should be instructed that it is entitled to assume a future tax amount or tax percentage of wages comparable to the past tax years.[8]

"Admittedly there are many variables that may affect the amount of a wage earner's future income-tax liability. The law may change, his family may increase or decrease in size, his spouse's earnings may affect his tax bracket, and extra income or unforeseen deductions may become available. But future employment itself, future health, future personal expenditures, future interest rates, and future inflation are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life."

8 Some flexibility may be required. Typically in such cases the evidence of past earnings takes the form of W-2 forms showing gross

We have considered Hellenic's other points on appeal, and find them without merit.

Affirmed.

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wages and withheld taxes for a calendar year. If the year in which the accident in suit occurred is included in the proof, it must be discounted as an economic barometer, since earnings in that accident-interrupted year will be less than normal, and the tax indebtedness accordingly uncharacteristic.

Application of this rule to the case at bar would not have been fair, since prior to the ruling we announce today plaintiff had no way of knowing that we would permit such a charge in such circumstances and under such an assumption.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

A. Daniel Fusaro
Clerk

Fanetti v. Hellenic Lines Ltd.
Docket No. 81- 7500

August Term, 1981
Decided May 6, 1982

Page 2571, line 13 - delete "adequate." and insert "inadequate." in place thereof.

A. DANIEL FUSARO, Clerk

ADF/hjd

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PASQUALE FANETTI,

Plaintiff-Appellee,

-against-

HELLENIC LINES LTD.,

Defendant-Appellant.

Docket No. 81-7500

NOTICE OF MOTION
FOR STAY OF MANDATE PENDING
APPLICATION FOR CERTIORARI
PURSUANT TO RULE 41 (b)
FED. R. APP. P.

Motion by:

Zock, Petrie, Reid & Curtin
Edwin K. Reid & Martin E. Coffey
(212) 425-0310

Opposing Counsel:

Zimmerman & Zimmerman
Martin Lassoff, Esq.
(212) 227-1350

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, FILED MAY 13, 1982, A. DANIEL FUSARO, CLERK

Has a request of opposing counsel for consent been refused? YES

Has service been effected? YES

Is oral argument desired? NO

Requested Return Date: May 25, 1982

Date of argument of appeal, if scheduled:

Judge or Agency whose order is being appealed:

Judges Newman, Oakes & Haight

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? NO

Would expedited appeal eliminate need for this motion? NO

If no, explain why not:

Stay is sought to allow appellant to prepare petition for certiorari.

Brief statement of the relief requested:

Stay of mandate pending defendant-appellant's application to the Supreme Court for a writ of certiorari.

Previous requests for similar relief and disposition: None

Statement of the issue (s) presented by this motion:

Should the mandate be stayed pending defendant-appellant's application for certiorari to the Supreme Court.

Brief statement of the facts:

Hellenic Lines Ltd. appealed from the denial of its motion for judgment n.o.v., remittitur or for a new trial after a jury verdict in favor of the plaintiff in U.S. District Court, Southern District, New York, in an action for personal injuries brought under the Longshoremen's and Harbor Workers' Compensation Act, which resulted in a judgment for the plaintiff in the amount of $511,190. All of these trial motions were denied. The Court of Appeals, Second Circuit, affirmed.

Summary of the argument:

Defendant-appellant submits that this Court should stay the mandate because this action raises significant questions regarding the scope of the duty to longshoremen by a shipowner, which simultaneously functions as a stevedore; and that the Supreme Court has not squarely addressed this issue in its previous opinions explicating the shipowner-stevedore relationship. In view of the size of the lower Court verdict and the significance of the issue to be raised in a further appeal, it is, therefore, requested that a stay of the mandate be issued.

5/13/82

MARTIN E. COFFEY
Attorney for
Defendant-Appellant

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, FILED MAY 24, 1982, A. DANIEL FUSARO, CLERK.

5/24/82

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

PASQUALE FANETTI, :

Plaintiff, : 80 Civ. 3689 (CBM)

-against- :

HELLENIC LINES LTD., :

Defendant. :

----------X

APPEARANCES:

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Attorneys for Defendant

CONSTANCE BAKER MOTLEY, D.J.

MEMORANDUM OPINION

On February 13, 1981, the jury entered a verdict in this longshoreman's injury suit in favor of plaintiff, Pasquale Fanetti, in the amount of $511,100. Defendant, Hellenic Lines Ltd. (Hellenic Lines), moved for judgment n.o.v., remittitur or a new trial on a number of grounds. For the reasons discussed below, defendant's motion is denied.

Pasquale Fanetti commenced this action on June 30, 1981, against Hellenic Lines, the owner of the M.V. Hellenic Splendor, to recover for injuries allegedly sustained while he was working as a longshoreman aboard the vessel. Fanetti claimed that during the course of stevedoring operations a dangerous condition developed aboard the vessel when the seamen employed by

Hellenic Lines placed greasy wires and cables on the deck in the area in which Fanetti was required to work. At about 3 o'clock in the afternoon of May 6, 1980, when Fanetti was walking back to his station to operate the winch, he slipped on the grease left on the deck by the wires and fell on the wires, suffering injuries to his neck, back and shoulder. Fanetti alleged that the accident was due to Hellenic Lines' negligence in failing to remedy this obviously dangerous condition.

After a five-day trial, the jury found that Hellenic Lines' negligence was a proximate cause of the accident and awarded Fanetti $50,000 for past pain and suffering, $50,000 for future pain and suffering, $1,100 for past medical expenses, $1,500 for future medical expenses, $29,000 for past lost wages, and $550,000 for future

lost wages. The jury subtracted $170,500 from the total amount of damages of $681,600, representing the amount of plaintiff's contributory negligence, which it found to be 25 percent. The final award was $511,100. See Special Interrogatories to the Jury - Damages.

Hellenic Lines argues that the Court should enter judgment n.o.v. because there was no evidence that a complaint regarding the grease on deck was ever made to a mate or ship's officer with supervisory powers. A shipowner can only be liable if it has actual or constructive notice of the dangerous condition that led to the longshoreman's injury. Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 685 (2d Cir. 1978); Evans v. Transportacion Maritime Mexicana SS "Campeche", 639 F.2d 848, 855 (2d Cir. 1981). The jury was charged as to this rule. See

Charge of the Court, p. 12. Hellenic Lines relies on Judge Friendly's dissent in Canizzo v. Farrell Lines, Inc., supra, 579 F.2d at 690, for its contention that any knowledge of the ship's deckhands about the grease would be imputable to the shipowner only if they had a duty to inform the shipowner about it or if they were ship's officers. Judge Friendly's dissent, however, is in conflict with the majority opinion on this point.

The majority in Canizzo v. Farrell Lines, Inc., affirmed the district court's judgment establishing liability on the part of the shipowner for injuries sustained by a longshoreman when he slipped on a patch of grease which was partially covered by a pile of wires which lay on the deck. The district court found that the shipowner had actual or constructive knowledge of the obviously dangerous condition inasmuch

as the ship's personnel should have seen the grease on the deck when they placed cluster lights in the area. This finding rested on testimony that the grease, wire and cluster light wires existed in the area of the accident, that the grease was there three or three and one-half hours before the accident, and that the cluster lights had been placed on the deck by the ship's company. Canizzo v. Farrell Lines, Inc., supra, 579 F.2d at 684, 686. The Court of Appeals concluded,

> [t]he existence of a substantial area of grease in a narrow passageway, which should have been known to the ship's personnel, made more dangerous by the positioning by the ship's personnel of the cluster lights and wires upon the greasy area supports the finding of negligence on the part of the ship and justifies the plaintiff's judgment. . . .

Id at 686.

Thus, in the instant case, it was proper for the jury to find that Hellenic Lines had actual or constructive notice of the dangerous condition based on the evidence that the ship's crew created the condition by placing greasy wires on the deck where Fanetti was required to work.

Hellenic Lines argues that a new trial is required because this Court failed to instruct the jury as to the stevedore's responsibility for the safety of the longshoremen, including the contents of the relevant Safety and Health Regulations for Longshoring. Hellenic Lines' argument is based on the recent Court of Appeals' decision in Evans v. Transportasion Maritime Mexicana SS "Campeche", 639 F.2d 848 (2d Cir. 1981) (Evans), which held that the trial court erred in neglecting

to include such a charge to the jury. The Court in Evans set forth a detailed analysis of a shipowner's liability for negligence in longshoremen's injury suits, "[r]ecognizing that district courts can 'scarcely be expected to function with so discordant a chorus on this court,'. . ." Id. at 853 (citation omitted). Unfortunately, the correctness of Hellenic Lines' assertion under the standards set by this Circuit remains uncertain after Evans.

The gravamen of the Court of Appeals' opinion in Evans regarding a shipowner's negligence in the case of an obviously dangerous condition is that "a vessel is not liable for injuries resulting from known or obvious dangers unless the shipowner should anticipate the harm despite the obviousness of the danger." Id. at 855.

The Court went on to hold that "[i]n determining whether a shipowner should anticipate injury to longshoremen resulting from a known dangerous condition, courts must take into consideration the independent-contractor status of the stevedore". Id. at 856 (emphasis added). The Court explained that, "[t]he stevedore is specifically hired for its expertise in loading and unloading cargo, and in many cases it will be perfectly reasonable for the shipowner to assume that the stevedore will correct the defect." Id. In achieving the goal of reaching a realistic conclusion concerning the shipowner's reasonable anticipation, therefore, the trier of fact should recognize that ordinarily a ship should be entitled to rely on its stevedore to perform its job in a safe and workmanlike fashion. Accordingly, the Court

of Appeals held that the district court erred in failing to inform the jury that, for the purpose of determining shipowner anticipation, they could consider the fact that the stevedore, which was an independent contractor, is primarily responsible for the safety of the longshoremen and is obligated to take whatever steps are necessary to correct an unsafe condition aboard the ship. Id at 860.

The court in its charge in the instant action followed the general rule set forth in Evans by instructing the jury as follows:

> [t]he shipowner is not liable for injuries resulting from known or obvious dangers unless the shipowner should anticipate a harm despite the obviousness of the danger. In other words, mere knowledge of the dangerous condition may not serve as an

> independent basis for liability. Rather, the shipowner must be held liable for an obviously dangerous condition arising during the process of loading and unloading only if it, the shipowner, should reasonably have anticipated that the longshoreman would not be able to avoid harm.

Charge of the Court, pp. 11-12. The Court determined, however, that it was not necessary to instruct the jury as to the stevedore's duty to correct an unsafe condition aboard ship since the stevedoring operations in the instant action were performed by employees of Hellenic Lines and not by an independent contractor, as was the case in Evans. Thus, unlike the situation in Evans, there was no independent contractor with primary responsibility upon whom Hellenic Lines could reasonably rely to correct the dangerous condition.

See Canizzo v. Farrell Lines, Inc., supra, 579 F.2d at 689 (Friendly, J., dissenting). It would therefore not have been helpful to the jury in reaching a realistic conclusion concerning the shipowner's reasonable anticipation to instruct them as to the stevedore's duties. Accordingly, this court rejects Hellenic Lines' argument that Evans requires that the Court include such instructions when the stevedore is not an independent contractor.

Hellenic Lines also moves for a new trial on the ground that plaintiff's medical testimony regarding his permanent injuries was so speculative that it should not have been submitted to the jury. Fanetti presented two medical experts who testified as to his injuries - Dr. Leo J. Koven, an examining orthopedist, and Dr. Suda B.

Patel, who was in partnership with Fanetti's treating doctor. Dr. Koven testified that his diagnosis of Fanetti's condition, based on his physical examination of Fanetti and his analysis of x-rays of Fanetti's neck, was that Fanetti suffered from a quiescent, pre-existing arthritis and pinching of a nerve in the root of his neck which had been aggravated by the accident of May 6, 1980. Dr. Koven also testified that Fanetti suffered from adhesive capsulitis of the injured shoulder, also known as frozen shoulder, caused by the tearing of tissue and bleeding, which painfully limited Fanetti's ability to lift his right arm. Testimony of Dr. Koven, pp. 7-8. Dr. Koven testified that, with reasonable medical certainty, the accident of May 6, 1980, was the competent producing cause of these injuries and that, with

reasonable medical certainty, he did not believe that Mr. Fanetti would ever be able to return to work as a longshoreman. Testimony of Dr. Koven, pp. 9-10. Dr. Patel also testified that Fanetti suffered from adhesive capsulitis as a result of the accident and that, with reasonable medical certainty, Fanetti would not be able to return to work. Testimony of Dr. Patel, pp. 11, 12, 15. In light of this testimony, the court finds that there was sufficient evidence for the jury to find that Fanetti suffered from a frozen shoulder and an aggravation of his pinched nerve condition which resulted from the accident and which created a permanent disability.

Hellenic Lines contends that a new trial or remittitur is required because plaintiff failed to mitigate his damage by getting an electromyogram (EMG).

This argument is not persuasive. Dr. Patel testified that the purpose of EMG studies would be to determine the extent of the damage to Fanetti's nerves. Testimony of Dr. Patel, p. 13. There was no evidence that the EMG would have provided treatment of Fanetti's injuries or would have otherwise served to diminish Fanetti's damages.

Hellenic Lines contends that it is entitled to a new trial because the jury did not have before it a present worth table when it calculated the amount of plaintiff's award for future pain and suffering and future lost wages. The Court instructed the jury that in the case of the award of future damages it was required:

> to discount, or reduce to its present worth the amount of the anticipated future loss by taking, one, the interest rate which plaintiff could reasonably be

> expected to receive on an investment today of a lump sum payment together with, two, the period of time over which the future loss is reasonably certain to be sustained, and then deduct from the total award for anticipated future losses whatever that amount would be reasonably certain to earn or return if invested at such rate of interest over such future period of time, and include in the verdict an award for only the present worth, that is, the reduced amount of the total anticipated future loss.

Charge of the Court, pp. 25-26. The court suggested that the jury use a discount rate of two percent. The court also noted that it took judicial notice of a chart which shows the present worth of a dollar invested today over a period of years at the rate of two percent and that the jury might send for the chart if it got to

the point of calculating present worth.

After the jury returned its verdict in favor of plaintiff the court questioned the forelady of the jury as to whether the amounts awarded for future pain and suffering, future medical expenses and future lost wages had been discounted to their present value. The forelady responded that the jury had discounted the awards to their present value as the court instructed. Transcript, 3-13-81, pp. 1-2. The court concludes that the jury was properly charged as to the requirement that awards for future damages be discounted to their present worth. The two percent present value chart is only an aid to the jury in making its calculations of present value; the jury's failure to use it does not require a new trial.

Finally, Hellenic Lines asserts that a new trial is required because the

jury was not instructed to deduct future income taxes from its determination of the amount of future lost wages. Hellenic Lines relies on a recent United States Supreme Court decision, Norfolk & Western Railway Company v. Liepelt, 444 U.S. 490 (1980) (Liepelt), for this contention. In Liepelt, a wrongful death action arising under the Federal Employer's Liability Act, the Supreme Court held that the trial judge erred in excluding evidence of the income taxes payable on the decedent's past and estimated future earnings and in refusing to instruct the jury that the award of damages would not be subject to income taxation. The petitioner in Liepelt had offered to prove in the trial below through the testimony of its expert, an actuary, that the decedent's federal income taxes during the years 1973 through 2000 would have

amounted to about $57,000.

Upon consideration of the holding in Liepelt, this court finds that its charge was in accordance with the Supreme Court's ruling. The court charged the jury, as required by Liepelt, that "[i]f you make an award to the plaintiff, the amount so awarded is not subject to federal or state income taxes and no amount may be added to the award believing that such taxes would be due." Charge of the Court, p. 27. The court did not exclude any evidence offered by Hellenic Lines of income taxes payable on Fanetti's estimated future earnings. In fact, Hellenic Lines' counsel states in its memorandum of law in support of its motion that "there was no evidence on this issue [of plaintiff's future income taxes] except for some of plaintiff's prior income tax returns." Defendant's Memorandum

of Law at 26-27. The holding in Liepelt only required that the trial judge allow defendant to introduce evidence of income taxes payable on estimated future earnings; it did not require that the trial judge instruct the jury to deduct future income taxes where no evidence was presented.

For the reasons discussed above, Hellenic Lines' motion for a new trial, remittitur or judgment n.o.v. is denied.

Dated: New York, New York
June 15, 1981

CONSTANCE BAKER MOTLEY
U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of May, one thousand nine hundred and eighty-two

Present:

Hon. James L. Oakes

Hon. Jon O. Newman
Circuit Judges

Hon. Charles S. Haight,
District Judge

PASQUALE FANETTI,

Plaintiff-Appellee,

v. 81-7500

HELLENIC LINES LTD.,

Defendant-Appellant.

UNITED STATES COURT OF APPEALS, SEC. CIR.
FILED MAY 6, 1982, A. DANIEL FUSARO, CLERK

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this Court with costs to be taxed against the appellant.

A. Daniel Fusaro, Clerk

By Edward J. Guardaro,
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

PASQUALE FANETTI,

Plaintiff,

-against-

80 Civ. 3689 (CBM)

HELLENIC LINES LTD.,

Defendant.

----------X

JUDGMENT #81,0201

The issues in the above entitled action having been brought on regularly for trial before the Honorable Constance Baker Motley, United States District Judge and a jury on February 9, 1981, and at the conclusion of the evidence the jury having answered the attached "Special Interrogatories to the Jury" finding in favor of the plaintiff as against the defendant in the sum of $681,600.00., and the jury having

further found contributory negligence on the part of the plaintiff to the degree of 25%, thereby reducing the final award to $511,100.00., it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment as against the defendant in the sum of $511,100.00.

(CBM) Defendant shall have 30 days from date of verdict to file post trial motions.

Dated: New York, New York
February 21, 1981

_____
Clerk

APPROVED:

_____
U.S.D.J.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

PASQUALE FANETTI,

Plaintiff-Appellee,

-against-

Docket No. 81-7500

HELLENIC LINES LTD.,

Defendant-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Hellenic Lines Ltd., the defendant-appellant above-named, hereby appeals to the Supreme Court of the United States from the judgment entered in this action on May 6, 1982, affirming a judgment entered in the United States District Court, Southern District, for the plaintiff, after a jury trial.

This appeal is taken pursuant to

28 U.S.C. §1254.

Pursuant to U.S. Sup. Ct. Rule 28.5, 28 U.S.C. Rule 28, all parties required to be served have been served and counsel's names and addresses are listed below.

Dated: New York, New York
May 18, 1982

ZOCK, PETRIE, REID & CURTIN

By _____
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To: Zimmerman & Zimmerman
160 Broadway
New York, New York 10038

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

PASQUALE FANETTI, :

Plaintiff, :80Civ.3689 (CBM)

-against- :

HELLENIC LINES LTD., :

Defendant. :

----------X

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, that defendant herein, Hellenic Lines Ltd., does appeal to the United States Court of Appeals for the Second Circuit from the entire Order/Opinion of the Honorable Constance B. Motley, United States District Judge, dated June 15, 1981.

Dated: New York, New York
July 14, 1981

Yours etc.,

ZOCK, PETRIE, REID &
CURTIN
Attorneys for Defendant

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UNITED STATES DISTRICT COURT, FILED,
JULY 14 1981, S.D. OF N.Y.